United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7286

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

MANUEL M. KOUFMAN,

Plaintiff-Appellant,

—*against*—

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee,

HENDERSON DEVELOPMENT COMPANY, INC., AND JACK CHESBRO,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT OF ISSUES PRESENTED

1. Is an alleged contract for the leasing of real property for 17 years enforceable under the Statute of Frauds (New York General Obligations Law, Section 5-703(2)), where the agent subscribing the writings relied on, allegedly on behalf of the party sought to be charged, was not authorized in writing to do so?

The district court (Hon. Inzer B. Wyatt) answered that question in the negative.

2. Was such an alleged contract formed, or was it enforceable under the Statute of Frauds or otherwise, where neither the purported "acceptance" nor any other writing indicated:

(a) which of the offers (consisting of five different and mutually exclusive lease arrangements) had been "accepted";

(b) whether the offeror or offeree was to be responsible for the payment of taxes and insurance on the property (a point expressly reserved in writing for future negotiations);

(c) when the 17-year lease was to commence;

(d) when the building was required to be completed;

(e) whether the offeree would be required to assume outstanding mortgages in the event it exercised an option to purchase the property; or

(f) what the terms (including rates of interest) of any such mortgages would be?

The district court also answered that question in the negative.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-7286

MANUEL M. KOUFMAN,
Plaintiff-Appellant,

—against—

INTERNATIONAL BUSINESS MACHINES CORPORATION,
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BENDERSON DEVELOPMENT COMPANY, INC.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR DEFENDANT-APPELLEE

Statement of the Case

This is an appeal by plaintiff from the entry of summary judgment dismissing Count I of his complaint. Summary judgment was granted by Hon. Inzer B. Wyatt, with an opinion reported at 295 F. Supp. 784 (S. D. N. Y. 1969), reprinted in the joint appendix at 264a-74a.

A. Nature of the Case

The action was commenced March 29, 1966. The principal claim (and the one which is the subject of this appeal) is Count I, under which plaintiff demands damages of $1,900,000 for alleged breach of contract (4a-5a*). Under Count III, the only other claim asserted against IBM, plaintiff seeks damages of $100,000 for the value of services he purportedly rendered to IBM (6a-7a). Count III has been settled, conditional on the affirmance of summary judgment on Count I (275a-76a-3).

In Count I, plaintiff avers that he and IBM "on or about June 25, 1963", entered into a "written contract" (hereafter referred to as the "alleged agreement"),

> "... whereby plaintiff agreed to develop for IBM a tract of land in Cranford, New Jersey [the "Cranford project"], and to lease the building [a branch office] constructed on said land to IBM, with an option to IBM to purchase the land and building, all under the terms and conditions set forth in the contract." (4a-5a)

Plaintiff further avers that, although he "performed all the conditions and covenants" of the alleged agreement, IBM breached it by failing to perform its obligations and by awarding the Cranford project to another developer (5a).

In Count II, plaintiff asserts a claim against Benderson Development Company (the developer to whom the Cranford project was ultimately awarded) and Jack Chesbro, an officer thereof, for allegedly having induced IBM's breach of the alleged agreement (5a-6a). In Count III, plaintiff contends that he performed services at IBM's

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*Unless otherwise indicated, numerical references in parentheses are to pages of the joint appendix.

request "in connection with the reduction of the cost of construction of the building" (6a), that IBM "refused to make payment therefor" (7a) and that it was "unjustly enriched" (*ibid.*).

By its amended answer (8a-9a), served May 10, 1966, IBM denied all the material averments of the complaint, including the existence of the alleged agreement, and asserted affirmatively that the first claim was barred by the Statute of Frauds. IBM also averred, in the alternative, that even if the alleged agreement had been formed, plaintiff failed to perform and anticipatorily repudiated any such contract by refusing to proceed with the development of the Cranford project in accordance with the terms of his proposals, by demanding payment of amounts in excess of his proposals and by further demanding IBM's performance of conditions that were not specified in his proposals.

Neither plaintiff's second and third claims nor IBM's alternative defense of anticipatory repudiation is involved on this appeal. Rather, the issue presented is whether the parties formed any agreement which is enforceable under general contract law and the Statute of Frauds.

B. Prior Proceedings

In addition to extensive documentary production by both parties, IBM has taken plaintiff's deposition, and plaintiff has conducted examinations before trial of defendant Chesbro and the following IBM employees: Thomas F. Daly, an administrator in the real estate department of the Eastern Region of the Data Processing Division; George C. Roper, Jr., manager of that real estate department and Daly's immediate superior; Payson Hunter, manager of the real estate department of the Data Processing Division; Frank Chessa, a design administrator in the Eastern Region real estate department; and Frederick S.

Wright, manager of finance and administration for the Eastern Region of the Data Processing Division.

On April 15, 1968, IBM moved for summary judgment on Count I. The motion was granted on February 4, 1969.

C. Disposition in the Court Below

In dismissing Count I, Judge Wyatt held that "the undisputed facts" established three propositions of law:

1. "There was never any agreement between the parties" (295 F. Supp. at 785; 265a) because IBM's alleged "acceptance" of plaintiff's "offer" did not specify which of the five different and mutually exclusive proposals IBM desired to accept (*id.* at 787; 269a).

2. Even assuming, contrary to law, that an agreement had been formed, it would have been "too incomplete, uncertain and indefinite to be enforced", since it left open:

   (a) on which of plaintiff's various proposals the parties would proceed;

   (b) "who was to be responsible for taxes and insurance" (a point expressly reserved for future negotiations);

   (c) "when was the 17 year lease to commence";

   (d) "when was the building required to be completed"; and

   (e) whether IBM would have "to assume outstanding mortgages if it exercised the option to purchase the land and building" (*id.* at 787-88; 269a, 271a).

3. Further assuming, again contrary to law, that an agreement had been formed that was sufficiently certain and complete to be otherwise enforceable, it would not have been enforceable under the Statute of Frauds (New York General Obligations Law, Section 5-703(2)) because:

(a) none of the open terms had been completed in writing, if at all; and

(b) the agent who purportedly subscribed the alleged agreement on behalf of IBM was not authorized by writing to do so (295 F. Supp. at 789; 273a).

Judge Wyatt also directed that any appeal from that order of dismissal be deferred, pending trial on the remaining issues. On May 26, 1969, a Pre-Trial Order was signed by Hon. David N. Edelstein (consented to by all parties) which provided, among other things,

> "Since Count II of the Complaint against Benderson and Chesbro must fail if the disposition as to the first count is correct, Count II is severed by consent of the parties subject to renewal in the event of a reversal of the Court's disposition of Count I by appeal taken to the Court of Appeals for this Circuit. Trial will proceed on Count III alleged against IBM alone . . . ."

Because of the substantial overlap in facts between Counts I and III and the parties' consequent interest in obviating the necessity of a trial solely as to Count III, plaintiff and IBM, in April 1975, settled Count III with the approval of the district court, conditional on the affirmance of summary judgment on Count I (275a-76a-3).

Statement of Facts

By letter dated May 23, 1963 (19a), Daly invited plaintiff and other potential developers to submit proposals on the Cranford project. That invitation contained a form (20a-22a) which, when completed and mailed back by the developer, would constitute his proposals to construct a branch office building in Cranford, New Jersey, and to lease the building to IBM for a term of 17 years.

Four alternative lease arrangements were outlined in the form and the potential developer was asked to bid on at least one. Item I stipulated that IBM would be responsible for maintenance; Item II stipulated that the developer would be responsible for maintenance; Item III stipulated that the developer would sublease approximately 30% of the "usable square footage" of the building and IBM would be responsible for maintenance; and Item IV stipulated that the developer would sublease the same portion of the building and also absorb the maintenance expenses. The four Items obviously were mutually exclusive and called for bids in differing amounts.

Additionally, Item V required the developer (a) to grant IBM an option to buy the land and building after several years, (b) to indicate the various prices at which it would be willing to sell the property to IBM depending upon which, if any, of the four itemized arrangements had been accepted by IBM, and (c) to state whether it would be necessary for IBM to assume any outstanding mortgages in the event it elected to exercise the option to purchase.

The General Conditions (23a-24a), which were incorporated by reference in the proposal form, set forth estimates of the developer's cost of buying the land and constructing the building. Under Item VI, the developer was required to signify his awareness that those figures

were in fact only estimates and to state (against the possibility that the estimates proved inaccurate) the percentage of any cost-over-(or under-) estimate by which his bid on each of the four lease arrangements would be increased (or decreased).

The General Conditions also specified, among other things, that the "responsibility" for the taxes and insurance on the property "will be negotiated by parties at a later date" (23a). It should be noted in this connection that the estimated cost of the land and building was $1,230,000, and the real estate consisted of more than six acres bordering on the Garden State Parkway. In 1963, the published ratio of assessed-to-true values in the Township of Cranford, New Jersey was $24.50,* and the general tax rate in the Township was $11.35 per $100 (59a, 61a-65a). Based on those figures and the estimated cost of the land and building, the tax on the total property would have been approximately $34,000 a year ($1,230,000 × .245 = $301,350 × .1135 = $34,203).

By letter dated June 6, 1963, plaintiff forwarded to Daly his completed bid form (29a-32a), proposing different rental figures on each of the lease items. He failed, under Item V, to specify whether IBM would have to assume existing mortgages in the event IBM opted to buy the property; he indicated that IBM's rent would be increased by 7.8% of any cost over (and decreased by 7% of cost under) estimate. In his covering letter, plaintiff added a further proposal:

> "I trust I am not being presumptuous in making a further proposal as follows: I will lease this

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*The New Jersey courts have defined "true value" as "the full and fair value of each piece of property based upon what it would sell for at a fair and bona fide sale". Frater Corp. v. State of N. J., Div. of Tax Appeals, 80 N. J. Super. 427, 194 A. 2d 11 (1963).

> property to you for a term of seventeen (17) years with three five (5) year options for $95,000 per year, net, net, net up to, inclusive of the second five (5) year option, the third five (5) year option at a rental of $48,000 per year, net, net. During the twenty-sixth (26th) year you may buy the property from me for $575,000.00." (29a)

It is undisputed that plaintiff attended a meeting in New York on June 19, 1963, with Roper and Daly, at which the various construction company bids were opened* (37a-38a, 56a); that those bids exceeded the estimated cost of construction (39a-40a); and that Roper then stated that he would "have to go back to higher authorities" in order to proceed with the project, unless the costs could be reduced (41a).

It was at this tentative stage of the negotiations, before anyone had even attempted to achieve any reduction in construction costs (45a-46a), that the following letter signed by Roper on June 24, 1963, was mailed to plaintiff:

> "We reviewed the bid you submitted for the above mentioned location [Cranford project] and after careful consideration found that you were the successful bidder.
>
> "We would appreciate your contacting the architect for the job, Mr. Victor Lundy, pertaining to the plans and specifications, and to take whatever

*While (as was stipulated in the Pre-Trial Order of May 26, 1969) "it was contemplated by the parties that the developer of the building would enter into an agreement with the successful building-contractor bidder for the construction of the building", IBM had previously solicited bids from construction companies so as to expedite the project.

steps are necessary to secure the land for which IBM has arranged in your name. . . ." (35a)*

Irrespective of the actual purpose for which that letter was sent, the fact is that it failed to indicate on which of plaintiff's five different proposals he was considered the "successful bidder"; nor did it reflect any agreement as to when the 17-year lease was to commence, when the building was required to be completed, whether IBM would be required to assume outstanding mortgages in the event it exercised an option to purchase the property, what the terms of any such mortgages would be, or how responsibility for the taxes and insurance on the property would be allocated between the parties (a term which had been explicitly left open for future negotiations by plaintiff's proposals) (32a, 22a).

In point of fact, no agreement was ever reached, in writing or otherwise, on those open terms. On the question

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*Plaintiff's brief frequently states his version of facts, concededly beyond the scope of this appeal, in supposed "fairness to Koufman" (*e.g.*, Br. 5). In fairness to IBM and with some relevance (if not materiality) to the appeal, it might be noted that Roper's letter could not possibly have been intended to memorialize any agreement in the light of the fact that the entire project at that time was still very much up in the air and in view of the many terms still left open; nor, as plaintiff effectively admitted on his deposition, was it actually designed to lead plaintiff to take any present steps to acquire the property in question (47a-48a). It is also undisputed that plaintiff did not acquire the land or construct the building. Indeed, if a trial were necessary, IBM would prove that the letter was solicited by plaintiff, not as an acceptance of any of his proposals, but as something he could show the various banks with which he was then negotiating for financing as evidence of IBM's serious interest in pursuing the Cranford project with him.

A further indication that the parties here did not regard the Roper letter to have formed an agreement between them is provided by contrasting it with the detailed "Summary of Understanding" that the parties had executed just eleven days before (on June 13, 1963) with respect to a similar project in Utica, New York (153a-55a). Significantly, all the terms left open in the writings relied on in the present case were terms specifically agreed to in that Summary of Understanding.

of selection among plaintiff's five proposals, plaintiff testified that he was informed orally by Roper and Daly, before receiving Roper's letter, that they were "interested" in his bid on Item I (49a). (That testimony is inherently implausible since three other potential developers had underbid plaintiff on Item I (141a), whereas it was only on Items III and IV (under which plaintiff would take 13,264 square feet) that his bid was low (51a-53a, 141a). Moreover, Roper testified that he was interested in plaintiff's proposals on Items III and IV (51a-55a). For the purpose of this appeal, however, plaintiff's version will be assumed true, although, as will be discussed below (pp. 20-21), the very existence of an evidentiary dispute on this point is significant as a matter of law on the Statute of Frauds issue.

The only writings on which plaintiff relies as memoranda of the alleged agreement (42a-45a, 91a, 97a, 147a) were Daly's letter of May 23, 1963 (with enclosures) (19a-26a), his own letter of June 6, 1963 (with proposals dated June 5) (29a-32a), and Roper's letter of June 24, 1963 (35a).* While Roper and Daly were certainly authorized to negotiate the alleged agreement, they had no authority to execute or enter into any contract on behalf of IBM (66a-67a). Neither were officers or assistant officers of the company. Under the company's By-laws, no employee other than an officer or assistant officer, is authorized to enter into any lease or other contract, unless such authority

*Plaintiff also refers to a letter written to him by Daly on August 27, 1963 (95a-96a), in which Daly recites the reasons why the IBM Real Estate Department was going to turn to another developer on the Cranford project (specifically, plaintiff's insistence on a 22-year lease rather than a 17-year lease, and on an annual rental higher than that contained in his original proposals). In that connection, Daly loosely refers to "our previous commitment" and uses the word "accepted" in reference to plaintiff's offer. This letter, however, no more than the Roper letter of June 24, 1963, supplies the missing terms.

is expressly granted by resolution of the Board of Directors or Executive Committee (85a). No such resolution was passed regarding either employee (67a).

Summary Basis for Affirmance

Among the many specific points on which this alleged agreement was properly held to have been defective, Judge Wyatt based his grant of summary judgment on the bar of New York General Obligations Law, Section 5-703(2). That ground, particularly as reinforced by the subsequent New York Court of Appeals decision in *Commission on Ecumenical Mission and Relations of the United Presbyterian Church* v. *Roger Gray, Limited,* 27 N. Y. 2d 457 (1971), is the short answer to this appeal.

The *Ecumenical Mission* decision is not referred to in plaintiff's brief.

Argument

POINT I

THE COURT BELOW CORRECTLY DECIDED THAT THE AGENT'S LACK OF WRITTEN AUTHORITY TO EXECUTE A CONTRACT ON BEHALF OF IBM VOIDS THE ALLEGED AGREEMENT UNDER THE STATUTE OF FRAUDS.

It is not disputed that the alleged agreement is subject to N. Y. G. O. L. Section 5-703(2), which provides:

> "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing."

It is also undisputed that neither Roper nor Daly (the only IBM employees who signed the correspondence on which plaintiff relies) were officers or directors of IBM or had authority in writing to enter into any contract on behalf of IBM (Br. 12-15; 66a-67a). Indeed, under the company's By-laws, it was the lack, not the grant of authority that was expressed in writing (85a).

On the basis of the same lack of written authority, the New York Court of Appeals, in *Ecumenical Mission, supra,* granted summary judgment to the plaintiff-landlord, declaring invalid a purported lease extension given to one of its tenants by the managing agent of the former landlord of the building (plaintiff's predecessor-in-interest). To the extent, if any, a categorical ruling on the lack of written authority is necessary to reinforce the plain language of Section 5-703(2), the *Ecumenical Mission* decision provides such a ruling and is dispositive of this appeal.

Not surprisingly, in view of the identity of the material facts in both cases (and plaintiff's failure to discuss the *Ecumenical Mission* decision), every argument plaintiff advances on this appeal with respect to Section 5-703(2) was also raised, considered and flatly rejected in that opinion.

Thus, plaintiff launches his attack by criticising Judge Wyatt for allegedly "simplistic statutory construction"—that is, for holding "syllogistically that the statute required written authority, that none existed and therefore there was no contract" (Br. 6-7). Precisely, that syllogism, however, which the statute clearly mandates, was the holding in *Ecumenical Mission*:

> ". . . [P]laintiff landlord is entitled to summary judgment as a matter of law, as Special Term concluded. . . . The critical issue of law is whether the statute requires a writing and whether there is one.

> A writing is required and there is none. . . ." 27 N. Y. 2d at 465.

Plaintiff then marshalls various precedents and purported facts in an effort to establish that, under the general rules of agency, Roper and Daly had apparent authority (and that a jury would even find that Roper had "full" authority) to execute a contract on behalf of IBM *"without written authority from anyone to do so"* (italics are plaintiff's) (Br. 7-15). In dealing with the same sort of contention in *Ecumenical Mission,* the Court held:

> "In the first place, an issue under a Statute of Frauds, such as section 5-703, may not be resolved by reference to rules of agency affecting corporations. If it were otherwise, then the Statute of Frauds would be largely obviated as to corporations and to that extent rendered a virtual nullity . . . ." 27 N. Y. 2d at 461-62.

The point is that Section 5-703(2) precludes the application of general agency rules (most particularly the doctrine of apparent authority) to real estate transactions of this nature. Indeed, the holding in *Ecumenical Mission* was predicated on the very assumption that the tenant could prove by parol evidence that the managing agent, Aprahamian, had authority (and lacked only the written manifestation thereof) to execute the extension in issue:

> ". . . The nub of the issue is whether the Statute of Frauds requires that an employee acting as an agent be authorized in writing before he may execute certain kinds of instruments. For that issue it must be assumed that a party can supply parol proof that the actor was both an employee and an agent, and possessed with purported authority. Of course, if by

> the extraneous proof the purported agent's act was not authorized, or he was not an agent, that is the end of the matter and there is no need to have recourse to the Statute of Frauds. Consequently, the issue tendered on this appeal is, assuming that the purported agent was indeed the agent authorized by parol evidence, does his act of extending the lease fail for lack of compliance with the Statute of Frauds as to his own authorization (56 N. Y. Jur., Statute of Frauds, § 125, and cases cited at n. 3)." 27 N. Y. 2d at 462.

Hence, the Court in *Ecumenical Mission* considered it immaterial that the purported lease extension was signed "Madison Avenue Realty Corporation By Harry Aprahamian, Manager" (*id.* at 460); whereas plaintiff here nevertheless emphasizes that the purported "acceptance" was signed "Geo. C. Roper, Manager Real Estate Department" (Br. 10). Similarly, just as plaintiff argues that in other instances IBM recognized and performed leases signed by officials who did not have written authority (Br. 11), the Court in *Ecumenical Mission* dismissed as irrelevant the fact "that Aprahamian had in the past arranged lease extensions" (27 N. Y. 2d at 466).

Plaintiff also attaches great significance to the fact that Roper had authority to "negotiate" contracts for IBM (Br. 14). In *Ecumenical Mission,* the Court was quite prepared to assume that the managing agent, Aprahamian, also had authority to "negotiate" leases; in fact, such authority was even inferrable from a written instrument—the authorization Aprahamian had received from the corporate landlord to act as a managing agent. Nevertheless, the Court held:

> ". . . the issue is not whether the authority to manage embraces, under the second of the mentioned

> Statutes of Frauds [§ 5-703(2)], authority either to *negotiate* or make leases, but whether the specific authority to *execute* a lease required to be in writing is itself in writing. The letter to the employee-agent falls far short of satisfying the statute. In thus viewing the letter, it does not mean that a satisfactory written authorization must name the particular transaction, but at the very least it must give express authority to *execute* documents in a determinate class of transaction (cf. *Hamilton Park Bldrs. Corp.* v. *Rogers,* 4 Misc 2d 269; see 37 C. J. S., Statute of Frauds, § 213, p. 709, to the effect that: 'The writing need not be in any special form; but it must contain a sufficient expression of an intent to confer authority, and it must confer authority to *execute* the very contract which the agent undertakes to *execute.* The writing must contain express language conferring authority to *execute* a contract of sale'; see, also, *Bacon* v. *Davis,* 9 Cal. App. 83)." 27 N. Y. 2d at 465. (Emphasis added.)

Plaintiff further asserts that "to invoke the Statute of Frauds in the present circumstances would be to pervert [its] legislative intent" (Br. 14). Again, *Ecumenical Mission* is informative, for its summarization of the legislative history of this statute demonstrates such intent to be entirely concordant with the decision below:

> ". . . a lease for more than three years is a recordable instrument (Real Property Law, § 290). The reason why recordable instruments must in turn have their execution supported by documents of rank is self-evident. Otherwise the recorded documents would actually be resting on oral evidence. It is interesting in this context that at common law an agent could execute a sealed instrument

> only if he himself was authorized to do so under seal (Restatement, Second, Agency, § 28, Comment *a*). The Law Revision Commisison noted that the need for extending the agency provisions of the Statute of Frauds was created by the need to fill gaps resulting from the abolition of the seal (1944 Report of N. Y. Law Rev. Comm., pp. 124-126)." 27 N. Y. 2d at 463.

Finally, with respect to the totality of the same arguments that plaintiff mounts here regarding apparent authority, other agreements executed without written authority, corporate "acquiescence" in such agreements, purported estoppel stemming from such "acquiescence", and supposed unfairness and perversion of the public policy of this State (Br. 8, 11, 13-14), the Court in *Ecumenical Mission* stated:

> ". . . Nor may the frontal issue be avoided by raising attenuated issues of fact. The critical issue of law is whether the statute requires a writing and whether there is one. A writing is required and there is none. To accept the reasoning of the tenant is to blunt the applicable rule of law, open the door to inaccurate if not perjured recollections, and by the inescapable analogy between leases and the other real property instruments covered in the same section 5-703, unsettle the salutary and unvarying interpretations." 27 N. Y. 2d at 465.

As to the alleged harshness of this rule, we note the court's statement in *Goldenberg* v. *Bartell Broadcasting Corp.*, 47 Misc. 2d 105, 112, 262 N. Y. S. 2d 274, 282 (Sup. Ct. N. Y. County 1965):

> ". . . Generally, persons dealing with officers of a corporation are bound to take notice that the powers

> of an officer are derived from statutes, by-laws and usages which more or less define the extent of the officer's authority. . . . Those who contract with a corporation do so with knowledge of the statutory conditions pertaining to a corporation. . . .
>
> "The plaintiff is not a naive person, uninitiated in the business world, nor is he without knowledge of corporate financing or business practices. . . ."

Similarly, plaintiff here is "not a naive person, uninitiated in the business world". On the contrary, he has been, by his own claim, "a developer and financier of real estate property for many years" (90a). Thus, his claim now, that he was unaware of the Statute of Frauds requirements applicable to real estate transactions is as dubious in fact as it is legally irrelevant.

In sum, Section 5-703(2) requires affirmance of summary judgment. The other grounds cited for dismissal are equally correct and, for the sake of completeness, are discussed below.

POINT II

THE COURT BELOW CORRECTLY DECIDED THAT THE WRITINGS RELIED ON DO NOT CONSTITUTE AN AGREEMENT UNDER GENERAL PRINCIPLES OF CONTRACT LAW OR THE STATUTE OF FRAUDS.

It is axiomatic in the law of contracts that an agreement is not formed if the alleged acceptance fails to comply with the terms of the offer; and that an enforceable agreement is not formed if the offer and acceptance, read together, omit material terms. *Slater* v. *Gulf, Mobile & Ohio R. Co.*, 279 App. Div. 166, 108 N. Y. S. 2d 145 (1st Dep't 1951),

aff'd, 304 N. Y. 636 (1952); *Barber-Greene Co., Inc.* v. *Dollard, Jr., Inc.,* 239 App. Div. 655, 269 N. Y. S. 211 (3d Dep't 1934), *aff'd,* 267 N. Y. 545 (1935); *Poel* v. *Brunswick-Balke-Collender Co.,* 216 N. Y. 310 (1915). It is equally clear under the Statute of Frauds (N. Y. G. O. L., Section 5-703(2)) that the writings relied on will not create an enforceable contract unless they manifest the required acceptance and all material terms without resort to parol evidence. *In re Levin's Estate,* 276 App. Div. 739, 97 N. Y. S. 2d 148 (1st Dep't 1950), *aff'd,* 302 N. Y. 535 (1951).

The alleged agreement at issue on this appeal is defective, as the court below held, on the three grounds just noted.

No agreement was reached on at least five material terms or even on which of plaintiff's five different and mutually exclusive proposals the parties would proceed. And, of course, no writings reflect any such agreement.

Moreover, both the writings and the external circumstances make clear, as the court below stated,

> ". . . that despite the loose language of Daly and Roper ('Successful bidder', 'commitment to you', 'accepted', etc.) the parties did not intend the three documents to be any final agreement. They were not intending thereby to contract but to begin final negotiations with each other (excluding the other investor bidders) in the expectation that they would reach an agreement. At that last point they must have contemplated the execution of a letter agreement with specific provisions (such as that actually executed between them under date of June 13, 196[illegible] in respect of a building to be constructed in Ut[illegible], to be followed by execution of a lease." (295 F. Supp. at 787; 269a)

Indeed, the General Conditions of the bid explicitly anticipated the execution of a formal contract of lease* (23a); negotiations in fact ensued *after* the Roper letter of June 24, 1963 (95a); and plaintiff admitted being told (despite the contrary language in that letter) either "prior to" or "immediately after" the letter was sent, "that it wasn't necessary [for him to tie up the land in Cranford] because [IBM] had it well in control and were not in jeopardy of losing it" (47a-48a).

But the more clearly dispositive point for summary judgment purposes is that, as held by the district court,

> "It is apparent from the face of the 'offer' and 'acceptance' that no enforceable agreement was created between the parties." 295 F. Supp. at 787; 269a.

A. "In the First Place, the 'Acceptance' Was Not Sufficient To Constitute any Agreement Because It Did Not Specify Which Of the Various Alternatives IBM Accepted." (*Ibid.*)

The point was succinctly stated by Judge Wyatt:

> ". . . The proposal of Koufman was not one offer but a number of alternative and mutually exclusive offers. Only one of these could be accepted. IBM did not state in its 'acceptance' to which of the offers it was directed. Did IBM accept to lease the entire building or only part? Did IBM accept to be responsible for maintenance or for Koufman to be respon-

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*As stated in Bernat v. West 73rd Street Corp., 230 App. Div. 18, 20, 242 N. Y. S. 612, 614 (1st Dep't 1930), *appeal dismissed*, 256 N. Y. 588 (1931),

> " . . . The very fact that their memorandum states that a final contract is thereafter to be made, and the nature of the memorandum itself preclude the inference that there were not details yet unsettled. . . ."

> sible? Did IBM accept the 'further proposal', the fifth alternative, suggested separately by Koufman in his June 6, letter? . . ." *Ibid.*

And implicit in that list is the question of overriding importance: how much did IBM agree to pay?

1. The Alleged Oral Selection of Item I.

As to plaintiff's argument that these defects are cured by Daly's supposed verbal statements in June 1963 (that IBM was "interested in" Item I) and August ("could accept" it), the Statute of Frauds again provides the short answer. As stated in *In re Levin's Estate,* 276 App. Div. 739, 742, 97 N. Y. S. 2d 148, 151-52 (1st Dep't 1950), *aff'd,* 302 N. Y. 535 (1951),

> ". . . It is settled law that a memorandum sufficient to satisfy the statute of frauds must in itself or by reference to other writings be complete, so that the full intention of the parties can be ascertained from it alone without recourse to parol evidence. . . .
>
> ". . . The purpose underlying the Statute of Frauds is to protect certain transactions from the risks of fraud in parol evidence by immunizing them altogether from such evidence."

In dealing with a similarly obscure memorandum (the operative language of which was "I accept the above"), the court in *De Goode* v. *Burton,* 141 App. Div. 22, 24, 125 N. Y. S. 662, 663 (2d Dep't 1910), held that the critical issue—"What does Mr. De Goode accept?"—was not answered

> ". . . with reasonable certainty so that the substance [of the contract] can be made to appear from the record itself without recourse to parol evidence. . . ." *Id.* at 25, 125 N .Y. S. at 664.

The court then held that the memorandum was insufficient under the Statute of Frauds, among other grounds, since

> ". . . the minds of the parties never met in a completed contract in so far as the same can be made to appear from [that memorandum]." *Ibid.*

It may similarly be asked of the Roper letter, what, if anything, did Mr. Roper intend to accept? The fact that any answer to that question necessitates recourse not only to parol, but to substantially conflicting testimony, further demonstrates why the writings involved here run counter to the policy as well as the express language of the statute. As held by this Court in *Ginsberg Machine Co.* v. *J & H Label Processing Corp.*, 341 F. 2d 825, 828 (2d Cir. 1965), a term is deemed "essential" and thus cannot be supplied by parol

> ". . . if it seriously affects the rights and obligations of the parties *and there is a significant evidentiary dispute as to its content.*" (Emphasis added.)

The evidentiary dispute here is starkly demonstrated by the depositions. Plaintiff testified that IBM was "interested in" Item I (263a); Roper testified that he, at the time, was interested in Items III and IV (52a-54a).

While the existence of a factual dispute will, in other contexts, preclude summary judgment, the dispute presented here—regarding the alleged content of terms plainly left open on the face of the writings in question—actually reconfirms, as a matter of law under the *Ginsberg* decision, the insufficiency of the memoranda under the Statute of Frauds.

2. The Alleged Post-Acceptance "Option".

As to plaintiff's contention that his offer conferred upon IBM an option or privilege to select, some time *after* an

effective "acceptance" had supposedly been given, any one of his five different proposals (Br. 19-20), the same statutory rule as well as basic contractual precepts apply.

An option is a right of appreciable value, for which businessmen have been known quite frequently to pay money. It cannot be implied in the absence of a specific grant, and no grant or even mention of an option of this nature appears in the writings on which plaintiff relies.*

Plaintiff urges that the missing grant can be supplied by reference to his subjective intent (*i.e.*, "it did not matter to him", he now claims, "which alternative IBM chose") (Br. 19). Under the Statute of Frauds, any such protestations of intent not manifested on the face of the writings in question are, of course, irrelevant. As stated in *Johnson* v. *Edmunds*, 278 App. Div. 470, 471, 106 N. Y. S. 2d 276, 277 (4th Dep't 1951),

> "The memorandum itself must be complete and the subject matter sufficiently expressed therein to obviate the necessity of proof as to what the parties intended. . . ."**

Plaintiff then argues, in effect, that unless the proposal of alternatives specifically negates on its face the offer of a post-acceptance option to select among those alternatives,

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*In contrast, plaintiff's proposals did offer IBM a post-acceptance option to purchase the property, which was clearly designated as such (30a-32a).

**Even apart from the irrelevance in law of plaintiff's alleged subjective intent to confer a post-acceptance option on IBM, it is hardly realistic to suppose, as plaintiff now claims, that a developer in his position had no need whatever to learn at the time of a real acceptance whether he would have had to prepare to sublease and tenant approximately 30% of the useable space of the building. Moreover, it might be noted that throughout the long period of discovery in this action, including plaintiff's own deposition, he never once alluded, nor did his counsel, to any intention on his part to have granted any post-acceptance option to IBM.

such an option must be read into those proposals (Br. 23). Of course, the thrust of contract law is precisely to the opposite effect: unless a term as significant as the grant of a post-acceptance option is specifically stated in the contract, it simply does not exist.

Surely, if it were plaintiff who were claiming that the Roper letter was insufficiently specific to bind him to proceed, and if it were IBM seeking to charge plaintiff with having granted it a post-acceptance option, the lack of such a grant on the face of the writings, and the failure of IBM to have selected one of those mutually exclusive alternatives, would clearly preclude any such contention. There is no reason why the result should be different when it is plaintiff who is seeking to imbue these writings with a non-expressed term.

Although this principle is sufficiently obvious as to make it unlikely that the point has been litigated extensively before, there is one decision in the New York courts which is squarely on point. Thus, in *North-Eastern Construction Co.* v. *Town of North Hempstead,* 121 App. Div. 187, 105 N. Y. S. 581 (2d Dep't 1907), bids were solicited by the defendant Town Board for the construction of a bridge of either four or five spans. The plaintiff contractor submitted a bid of $23,959 for a five span bridge and $22,200 for a four span bridge. In response, the Board adopted a resolution which (in so far as is pertinent here) stated that the "bid" be "accepted". In reciting one of the two grounds for its decision that a contract had not been formed, the Appellate Division stated, in language having compelling application to this appeal,

> ". . . Two bids were asked for, two bids were made, and there was but one bridge to be constructed. The general resolution of acceptance of the plaintiff's proposition was not entering into a con-

> tract for the construction of a four or five span bridge; it was merely a notification that both of the bids were lower than other bids, but the contract was yet to follow, and this was clearly contemplated by the form which was given out for such a contract, in company with the plans and specifications. . . ." *Id.* at 189-90, 105 N. Y. S. at 583.

Ostensibly in support of a contrary rule, plaintiff cites *Williston* to the effect that there is no "objectionable indefiniteness" where the "promisee is *given* an option" (emphasis added) (Br. 20). True enough, but plaintiff's citation of this point begs the question. For there is not one word or sentence in plaintiff's lease proposals which gave a post-acceptance option to IBM.

The one case cited by plaintiff in this connection, *Sylvan Crest Sand & Gravel Co.* v. *United States,* 150 F. 2d 642 (2d Cir. 1945), is neither on point nor in conflict with the *North-Eastern Construction* decision as he claims. In *Sylvan,* the plaintiff, a stone quarry company, submitted four bids to the Treasury Department, each bid offering to sell specified quantities of various itemized categories of rocks at stated prices. Unlike Roper's June 24, 1963, letter in response to plaintiff's five different lease proposals, the Government in *Sylvan* expressly accepted item 1 of each bid by writing on the bid form, " 'Accepted as to items numbered 1' " (150 F. 2d at 643). Thus, this Court noted that "each bid was accepted by the Assistant State Procurement Officer" (*ibid.*).

Additionally, Sylvan's proposals explicitly granted the Government in writing an option to cancel the order "at any time" (*ibid.*). There was, accordingly, no question in *Sylvan* either as to whether an option had been conferred or what had been accepted—the only question was whether the option gave so much freedom of action to the Government as to void the agreement for want of consideration.

Unquestionably, this Court interpreted the option explicitly granted to the Government, to cancel "at any time", as being inoperative unless exercised within a reasonable period (as, for example, not "after the defendant had given instructions for delivery and the plaintiff had tendered delivery in accordance therewith", *id.* at 644). To have done otherwise would have given an absurd meaning to a contract which had been entered into with formality, which unmistakably evidenced the Government's intention to be bound, and under which, the Government conceded in its pleading, it had already accepted and paid for deliveries (*id.* at n. 1).

But while the Court in that case was prepared to give a rational interpretation to an option explicitly granted on the face of the writings, there is nothing in the opinion to suggest that the law creates an option out of whole cloth when the writings fail to express it.

B. "In the Next Place, It Is Evident that if an Agreement Was Formed, It Is Too Incomplete, Uncertain and Indefinite To Be Enforced." (295 F. Supp. at 788; 271a)

1. "When Was the 17 Year Lease to Commence?" (*Ibid.*)

As Judge Wyatt noted, "Nothing was said about this." (*ibid.*). Yet surely the time of the commencement of the lease is a highly material term, the absence of which renders any purported lease agreement totally ineffective. As held in *Brause* v. *Goldman,* 10 App. Div. 2d 328, 334, 199 N. Y. S. 2d 606, 613 (1st Dep't 1960), *aff'd without op.,* 9 N. Y. 2d 620 (1961), also granting summary judgment,

> "The letters bear no indication as to the date on which the lease was to commence, the absence of which alone would render the memorandum unenforcible. . . ."

To the same effect is the decision in *St. Regis Paper Co.* v. *Rayward,* 16 App. Div. 2d 130, 225 N. Y. S. 2d 871 (1st Dep't 1962), *aff'd without op.,* 12 N. Y. S. 2d 1033 (1963). There, the court granted summary judgment dismissing the contract claim because of, among other defects, the lack of agreement on the "time set for the beginning of the lease"—and did so, despite a written memorandum signed by the parties, providing that "the parties are bound as above stated":

> ". . . '[W]ith material elements left for future negotiation' plaintiff was 'not bound and could withdraw from the negotiations without incurring any liability' for breach of contract. [Citing *Brause, supra.*] Moreover, the very indefiniteness of the May 21 writing rendered it impossible of enforcement. . . ." *Id.* at 134, 225 N. Y. S. 2d at 874.

Plaintiff attempts to cure this defect, which also, in and of itself, is dispositive of the appeal, by asserting as purported fact that the lease was to commence from the completion of the building, "that IBM *itself* was constructing the building" (emphasis is plaintiff's), and that it had earlier agreed with Chesbro, "for Koufman's benefit", to "pursue the commencement of this building" "as expeditiously as possible" (Br. 20, 28).

In the first place, the writings between plaintiff and IBM are utterly silent as to when the lease is to commence; they certainly do not state that it is to commence from the completion of the construction of the building. In the second place, whatever IBM may have agreed with Chesbro in April 1965, there is no basis in law for plaintiff's contention that he was the third party beneficiary of such an agreement—and no basis is stated.

In the third place, and most importantly, plaintiff's assertion "that IBM *itself* was constructing the building"

and therefore controlled the completion date is contrary to reality; in fact, plaintiff has stipulated with IBM that the reverse is true. Thus, the Pre-Trial Order entered in this case on May 26, 1969 (p. 3), states,

> "It was contemplated by the parties that the developer of the building would enter into an agreement with the successful building-contractor bidder for the construction of the building. . . ."*

Not only does that fact leave open the question of the commencement of the lease (even under plaintiff's assumption that it was to start with the completion of the building); it deprives this alleged agreement of another material term—namely, as Judge Wyatt noted, "When was the building required to be completed?" (295 F. Supp. at 788; 271a).

2. "Did IBM Accept To Assume Outstanding Mortgages If It Exercised the Option To Purchase the Land and Building?" (*Id.* at 787; 269a)

It is plain on the face of the writings in question that IBM had a serious interest in purchasing the building and regarded the option to purchase as an important right. It is equally apparent that that right could have been significantly impaired if IBM were required to assume mortgages at excessive rates. It is simply not conceivable, therefore, that IBM would have entered into a final contract with plaintiff, agreeing to assume whatever mortgage he obtained at whatever rate he obtained—*i.e.*, without specification as to what that rate was to be. Thus, the failure of plaintiff's offer even to indicate whether IBM was to assume outstanding mortgages (in the event of the exercise of its option to

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*That fact was indeed made evident on the face of the General Conditions which stated, among other things, that "other expenses" were

> "To be entirely the investor's responsibility—interim financing, taxes and insurance during construction, completion bonds, legal fees, and all other financial items incidental to the acquisition of the land and the completion of the building." (24a)

purchase), let alone to specify what rate of any assumed mortgages might be, constituted a defect of a most material order.

Plaintiff asserts that "the assumption or non-assumption of mortgages" would make no difference in "the economic burden of purchasing" (Br. 29). Since to assume a mortgage is to become personally liable on the mortgage so assumed, and *not* to assume a mortgage is to remain free of such personal liability, the materiality of the difference is evident.

3. "Who Was To Be Responsible for Taxes and Insurance?" (*Id.* at 788; 271a)

The General Conditions of the bid provided that "responsibility" for taxes and insurance "will be negotiated by the parties at a later date" (23a). It is not disputed that the taxes alone on this project would have approximated $34,000 a year (15a, Br. 27).

Even if the term left open here for future negotiations had been limited to "how the 'responsibility' for taxes and insurance would be handled", that, as the court below ruled, was "a significant element in any event" (295 F. Supp. at 788; 271a).

Thus, in *Ansorge* v. *Kane,* 244 N. Y. 395 (1927), the prospective buyer and seller of real property had agreed in writing on the total price, the amount of the down payment ($12,625), the mortgage terms and the dates on which the formal contract of sale would be executed (March 26) and title passed (May 26). The buyer, who was the party seeking enforcement, had even given the seller $500 as a binder. But since their written memorandum expressly reserved for negotiation the allocation of the amount of the down payment to be paid first on the signing of the contract and then on the delivery of the deed (only two months later), the Court of Appeals held that the memorandum could not be enforced under either general contractual principles or the Statute of Frauds:

> ". . . As a part of the agreement was left to future negotiations, the contract was embryonic. It never reached full time. It was not for nothing that the parties provided that a sum should be agreed on to be paid on the signing of the contract. . . ." *Id.* at 399.

In reality, all that was omitted in *Ansorge* was agreement on which of the two parties would bear the cost of a relatively small amount of money ($12,625, or some portion thereof) for a two-month period. In the present case, even under plaintiff's argument that the open term was limited to who would pay the taxes and insurance in the first instance (Br. 27), the ultimate assignment of that responsibility could have resulted in a cost-of-money figure far greater than that involved in *Ansorge*. For example, delays of only a week or two between plaintiff's payment of taxes and insurance and IBM's reimbursement of plaintiff, repeated semi-annually over the course of seventeen years on a sum each year in excess of $34,000 (which is just the taxes portion of the taxes and insurance total) would obviously exceed the two-month cost of a $12,625 figure.

But the important point is, as held in *Ansorge,* that the express reservation of this term for future negotiations removes the question of materiality from any doubt. As further stated in *Pollak* v. *Dapper,* 219 App. Div. 455, 220 N. Y. S. 104, 105 (1st Dep't), *aff'd,* 245 N. Y. 628 (1927),

> ". . . If this memorandum were silent as to the terms of the mortgage, the law would imply that the mortgage would be payable upon demand and at the rate of interest of six per cent. *But it is not silent.* It states 'terms to arrange upon the signing of the contract' and so shows upon its face that there were unsettled terms upon which the parties intended further to negotiate. . . .

> "In [*Spielvogel* v. *Veit,* 197 App. Div. 804 (2d Dep't 1921)] the court had to rely on an inference that there were still terms to be agreed upon. *Here no inference is necessary since the memorandum expressly states that there were still terms to be arranged.*" (Emphasis added.)

Likewise in *Drake* v. *Sop,* 131 Misc. 573, 575, 227 N. Y. S. 576, 578 (Sup. Ct. Chemung County 1928), the court held that

> ". . . if the memorandum had provided simply for a mortgage of $1,000 at six per cent and had been silent as to the payments or date of maturity, the law would have implied a mortgage due on demand. But the words 'on terms to be agreed upon' bring it within the condemnation of the rule as laid down by our Court of Appeals."

To be distinguished from cases such as the present (in which the writings expressly reserved *specific* terms for subsequent negotiations) are those involving (1) reservations of unspecified terms (*e.g.,* "other" terms to be agreed on), or (2) omissions of terms "usually found" in similar agreements. Memoranda in the first category have sometimes been upheld where, despite such generalized reservations, they evidenced agreement on all terms normally deemed essential to contracts of the same type. And, as the Court of Appeals observed in *1130 President Street Corp.* v. *Bolton Realty Corp.,* 300 N. Y. 63 (1949), while memoranda in the second category may be enforced absent proof of the parties' intention to leave such "usual" provisions for later negotiations, enforcement is denied where either

> ". . . the written agreement clearly indicated that additional terms were to be negotiated or . . . such a reservation was demonstrated upon trial. . . ." *Id.* at 68.

Conclusion

In sum, this case epitomizes the need for the Statute of Frauds in transactions as important as those dealing with real property—and the utility of summary judgment where the Statute applies. The only factual disputes involved in this action are those concerning the content of terms unmistakably left open on the face of the writings relied on. As held by this Court in the *Ginsberg* decision discussed above (p. 21), precisely that sort of dispute reinforces, rather than detracts from, the applicability of the Statute.

Thus, the omission of material terms from plaintiff's proposals, the failure of the alleged "acceptance" to indicate on which of those proposals he was considered "the successful bidder", and the lack of any written authority for any such "acceptance" are the "material facts", as to which Judge Wyatt correctly held, "there is no genuine issue" (295 F. Supp. at 785; 264a). On the basis of those facts, and for the foregoing reasons, the decision appealed from should be affirmed with costs.

October 3, 1975.

Respectfully submitted,

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